

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

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4 ROSEMARY GARITY,  
5 Plaintiff,  
6 v.  
7 APWU-AFL-CIO, et al.,  
8 Defendants.

Case No. 2:11-cv-01109-APG-CWH

**ORDER GRANTING IN PART AND  
DENYING IN PART THE  
DEFENDANT'S MOTION IN LIMINE  
TO EXCLUDE EXPERT TESTIMONY**

(ECF No. 149)

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10 Defendant American Postal Workers Union, AFL-CIO (APWU) moves to exclude  
11 plaintiff Rosemary Garity's two experts, Dr. Gregory Brown and Patricia Barnes. APWU argues  
12 the proposed expert testimony is not relevant to any of Garity's remaining claims. APWU also  
13 argues the testimony is not reliable because the experts rely primarily on Garity's version of  
14 events with no independent investigation. Finally, APWU contends that even if relevant, the  
15 evidence should be excluded under Federal Rule of Evidence 403.

16 Garity responds that the experts are relevant to the emotional distress she suffered due to  
17 APWU's conduct. Garity disputes that the experts relied solely on her statements. For example,  
18 she notes that Dr. Brown reviewed medical records and other evidence, conducted interviews, and  
19 performed a psychological test. Garity contends Barnes is qualified as an expert in bullying and  
20 will be able to explain to the jury the effect that the acts of her supervisors, local union members,  
21 and the national APWU had on her.

22 Federal Rule of Evidence 702 permits testimony based on "scientific, technical, or other  
23 specialized knowledge" by experts qualified by "knowledge, skill, experience, training, or  
24 education" if the testimony is both relevant and reliable. The judge acts as a "gatekeeper" to  
25 exclude expert testimony that is not both relevant and reliable. *Kumho Tire Co., Ltd. v.*  
26 *Carmichael*, 526 U.S. 137, 147 (1999). Whether to admit expert testimony, as well as deciding  
27 how to determine the testimony is reliable, lies within the trial judge's discretion. *Id.* at 152;  
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1 *United States v. Calderon-Segura*, 512 F.3d 1104, 1109 (9th Cir. 2008). The party offering the  
2 expert testimony bears the burden of establishing its admissibility. *Lust By & Through Lust v.*  
3 *Merrell Dow Pharm., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

4 Testimony is relevant if it will “help the trier of fact to understand the evidence or to  
5 determine a fact in issue.” Fed. R. Evid. 702(a); *see also Daubert v. Merrell Dow Pharms., Inc.*,  
6 43 F.3d 1311, 1315 (9th Cir. 1995) (stating testimony is relevant if it “logically advances a  
7 material aspect of the proposing party’s case”). To be helpful to the jury, the testimony must be  
8 “tied to the facts” of the particular case. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591  
9 (1993) (quotation omitted).

10 Expert testimony is reliable if it is “based on sufficient facts or data,” is “the product of  
11 reliable principles and methods,” and the expert “has reliably applied the principles and methods  
12 to the facts of the case.” Fed. R. Evid. 702(b)-(d). In *Daubert*, the United States Supreme Court  
13 set forth a non-exclusive list of factors that may guide a court in assessing the reliability of  
14 offered testimony: (1) whether a scientific theory or technique “can be (and has been) tested,” (2)  
15 whether the theory or technique “has been subjected to peer review and publication,” (3) the  
16 known or potential rate of error and “the existence and maintenance of standards controlling the  
17 technique’s operation,” and (4) whether the technique is generally accepted. 509 U.S. at 592-93.  
18 Depending on the type of expert testimony offered, these factors may not be appropriate to assess  
19 reliability. *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006). The *Daubert*  
20 factors may have little application to expert testimony based on personal knowledge or  
21 experience. *Id.* In such circumstances, the trial court should not apply the *Daubert* factors in an  
22 unduly restrictive manner. *Id.* The trial court should be mindful that “[t]he test for reliability . . .  
23 is not the correctness of the expert’s conclusions but the soundness of his methodology.” *Stilwell*  
24 *v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1191-92 (9th Cir. 2007) (quotation omitted). The trial  
25 court should ensure the expert “employs in the courtroom the same level of intellectual rigor that  
26 characterizes the practice of an expert in the relevant field.” *Cooper v. Brown*, 510 F.3d 870, 942  
27 (9th Cir. 2007).  
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1           **A. Dr. Brown**

2           Although a plaintiff is usually not required to provide expert testimony to prove emotional  
3           distress, “such testimony is not irrelevant.” *Bailey v. Runyon*, 220 F.3d 879, 881 (8th Cir. 2000).  
4           “To the contrary, [courts] recently have noted the probative value of expert psychological proof  
5           regarding causation of the claimant’s depression and emotional distress.” *Id.* (quotation omitted);  
6           *see also U.S. E.E.O.C. v. Consol. Resorts, Inc.*, No. 2:06-cv-01104-LDG-GWF, 2008 WL  
7           942289, at \*9 (D. Nev. Apr. 7, 2008) (“When emotional distress is unusually severe or alleged in  
8           clinical terms, or when another party intends to offer expert testimony about the distress, the  
9           testimony of an expert would help the trier of fact understand the nature, severity, and  
10          characteristics of the emotional distress.” (quotation omitted)). Dr. Brown’s anticipated  
11          testimony therefore is relevant.

12          It is also sufficiently tied to the facts of the case to be helpful to the jury. Dr. Brown  
13          opines that Garity had no history of psychological illness until she worked at the post office. ECF  
14          No. 149-2 at 12. She thereafter was treated by multiple providers for depressive disorder and  
15          anxiety and was taking antidepressants and anti-anxiety medications. *Id.* at 13. Dr. Brown noted  
16          that each provider documented that work-related stress was contributing to Garity’s condition. *Id.*  
17          Additionally, her condition worsened over the course of her employment but then improved when  
18          she stopped working there. *Id.* at 7, 13.

19          APWU argues that Dr. Brown refers only to “workplace stress” and not specifically to  
20          APWU’s alleged acts of discrimination and retaliation. However, Dr. Brown refers to the fact  
21          that Garity’s problems were “compounded by the lack of support provided by the Union, who she  
22          deeply perceives as having colluded with management, which increased her stress level markedly  
23          throughout her experience.” *Id.* at 13. Dr. Brown notes that in Garity’s view, she made  
24          complaints to APWU but received little response. *Id.* at 5. Dr. Brown opined that “[g]iven the  
25          time of onset of the depressive and anxiety symptoms combined with descriptions of her  
26          workplace environment and supported by the progress notes and objective psychological testing  
27          conducted by multiple outpatient providers, it is reasonable to conclude that both the depression  
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1 and the anxiety is a direct result of stress within the workplace environment, linked both to  
2 management and by lack of union support.” *Id.* at 13. It remains an open question whether  
3 APWU is liable for the local union’s actions. *See* ECF Nos. 76 at 20-21; 182 at 15-20.

4 Consequently, the overall stressful work environment, as allegedly exacerbated by union  
5 officials’ conduct at both the local and national levels, is tied to Garity’s remaining claims.

6 Dr. Brown’s anticipated testimony is the product of reliable principles and methods under  
7 Rule 702. Dr. Brown conducted three different interviews with Garity, each for an hour or  
8 longer. ECF No. 149-2 at 3. He also interviewed Garity’s husband, reviewed Garity’s records  
9 from numerous other providers, and reviewed some evidence from the lawsuit. *Id.* He  
10 administered the Minnesota Multiphasic Personality Inventory 2 (MMPI 2) diagnostic test to  
11 Garity and diagnosed a form of chronic low grade level depression. ECF No. 149-2 at 12.

12 These types of diagnostic techniques are part of a valid methodology for psychological  
13 evaluation. *See, e.g., United States v. Finley*, 301 F.3d 1000, 1009 (9th Cir. 2002) (finding  
14 “proper psychological methodology and reasoning” where the expert “relied on accepted  
15 psychological tests, from which he drew sound inferences, and he took a thorough patient history,  
16 including meeting with Finley’s wife and observing Finley’s behavior”). Dr. Brown’s opinions  
17 are not based solely on Garity’s statements. “[R]ather, he used his many years of experience and  
18 training,” as well diagnostic testing, “to diagnose [Garity’s] mental condition.” *Id.*

19 Finally, I have no basis to conclude at this stage of the proceedings that Dr. Brown’s  
20 testimony should be excluded under Rule 403. I therefore deny the motion to exclude Dr. Brown.

#### 21 **B. Barnes**

22 Barnes is presented as an expert in workplace bullying. If permitted to testify, Barnes  
23 would opine about what workplace bullying is, that it can cause severe mental and physical  
24 distress, that Garity was subject to severe and pervasive workplace bullying, and that such  
25 bullying “could reasonably be expected to cause [Garity] to suffer both physical and mental  
26 harm.” ECF No. 149-3 at 2. I grant APWU’s motion to exclude Barnes. This testimony would  
27 not be helpful to the jury because it does not concern matters beyond the common knowledge of  
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1 the average layperson. *United States v. Cazares*, 788 F.3d 956, 977 (9th Cir. 2015) (“Experts may  
2 be used to testify to matters outside the expected knowledge of the average juror.”). The average  
3 juror would not need an expert on bullying to evaluate Garity’s alleged emotional distress in this  
4 case. I therefore grant APWU’s motion to exclude Barnes.

5 **C. Conclusion**

6 IT IS THEREFORE ORDERED that defendant APWU-AFI-CIO’s motion in limine to  
7 exclude expert testimony (**ECF No. 149**) is **GRANTED in part and DENIED in part**. Dr.  
8 Gregory Brown is not excluded. Proposed expert Patricia Barnes is excluded.

9 DATED this 15th day of August, 2017.

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13 ANDREW P. GORDON  
14 UNITED STATES DISTRICT JUDGE  
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